United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 15, 2005

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: N.E.G. Services LLC and
Power Services Co.
Cases 4-CA-32939; 33315; 33415

524-0167-1000
530-6033-7056-8700
530-6067-2020

These cases were submitted for advice as to: (1) whether the Employer's reduction of unit employees' scheduled bonuses was inherently destructive of important employee rights; (2) whether the unlawful reduction of the bonuses tainted subsequent negotiations and precluded the Employer from lawfully implementing changed terms and conditions of employment after the Union refused further bargaining; and (3) whether the Employer engaged in overall surface bargaining during the negotiations with the Union.[1]

We conclude that the Region should not allege that the Employer's conduct was "inherently destructive" of important employee rights. We agree with the Region that the Employer's unlawful reduction of unit employees' scheduled bonuses so tainted the parties' bargaining that the Employer's September 2004 unilateral implementation of its bargaining proposals violated Section 8(a)(5), and that the overall surface bargaining allegation should be dismissed, absent withdrawal.

FACTS

On April 4, 2003, IBEW Electrical Workers Local 94 (the Union) filed a petition to represent a unit of 36 operations and maintenance employees employed at an electricity generating station located in Carney's Point, New Jersey, one of eight facilities owned by PG&E National Energy Group, Inc. (the Employer).[2] After a May 16, 2003, election, the Union was certified as representative on May 28, 2003.

---

[1] These cases were also submitted for advice as to whether interim injunctive relief should be sought under Section 10(j) of the Act. The appropriateness of injunctive relief will be addressed in a separate memorandum.

[2] The Employer subsequently changed its name to National Energy Gas and Transmission.

One of the main issues during the campaign was the Employer's long-standing "Site Team Incentive Plan," which pays employees an annual bonus based on a variable percentage of the employee's annual wage compensation. The bonus percentage depends on the site's performance with respect to a variety of target goals during the calendar year. In January and February of each year, the Employer determines the amount of the bonus for the previous year and then pays the bonus in April. According to the Employer, the approximate bonus percentages paid to the Carney's Point employees have been 15 percent for 1996, 27 percent for 1997, 30 percent for 1998, 14 percent for 1999 (a generator outage year), 29 percent for 2000, 27 percent for 2001, and 22 percent for 2002. In its election campaign literature, the Employer stated that its other unionized plants that were participating in the bonus plan were capped at 15 percent rather than 30 percent (at one unionized plant the Employer has no bonus plan).

After the Union's certification, the parties commenced bargaining on June 23, 2003. The Union initially proposed that the Employer continue the existing bonus plan for the bargaining unit, with the modification that "the specific goals, metrics and performance factors" comprising the bonus would be subject to bargaining and that the Employer negotiate with the Union before the implementation of specific performance goals. The Employer responded that the Union's overall proposals were too restrictive and that they would force the Employer to consider their impact on the bonus plan. At the third meeting on July 9, the Employer made its initial proposal on bonuses -- that bargaining unit employees receive no bonus for 2003 or in future years. The Employer explained that, unlike the other unions with which it has collective bargaining agreements with a bonus plan at other sites, the Union's approach to a contract would not leave the Employer with sufficient flexibility in operations to warrant a bonus of any kind.

The Union then modified its bonus proposal to exclude Union participation in setting the goals and metrics of the plan. The Employer responded that the Union had the Employer's position and that its position "was not based on any one item." However, the Employer indicated that, though it was proposing no bonus, it was willing to bargain about the issue.

In later bargaining, the parties occasionally revisited the bonus issue in a superficial way, but neither party changed its position. The Employer continued to propose no bonus, ostensibly because the Union was

proposing restrictive workplace rules and other limitations on management, and because its bonus plan was only appropriate where the Employer retained the managerial flexibility needed to make the bonus program a useful and effective management tool. The Union continued to propose a continuation of the existing bonus in future years, essentially without modification. While it did engage in these discussions about future years, the Union consistently refused to bargain over the bonuses for 2003, taking the position that the employees' entitlement to the bonus had already accrued and that the bonuses could not be eliminated because the accounting year was substantially under way.

On March 12, 2004, the Employer announced and implemented a reduction in the 2003 bonus by eliminating unit employees' bonuses for the period after July 9, 2003. The Employer decided the bonus amount for the entire year was 19.63%, and unit employees received just more than one-half of this amount -- a pro rata share of this amount reflecting the period from January 1, 2003, to July 9, 2003. All non-unit employees at the Carney's Point facility received the full 19.63% bonus, as did employees at the Employer's other facilities. In a memorandum to employees, the Employer stated:

> When IBEW Local 94 was certified as your bargaining representative in May 2003, matters such as the Incentive Plan became legally subject to negotiations. On July 9, the Company told the Union that we wanted to negotiate regarding the year 2003 Incentive Plan. Specifically, the Company proposed that there be no Incentive Plan going forward. The Union told the Company that it would not bargain about the year 2003 Incentive Plan. Despite several efforts by the Company to negotiate concerning the year 2003 Incentive Plan, the Union has maintained its refusal to bargain regarding this matter. Confronted with the Union's continuing refusal to bargain regarding this subject, the Company is implementing its proposal.

On March 26, 2004, the Union filed the charge in Case 4-CA-32939, alleging that the Employer violated Section 8(a)(3) and (5) in March 2004 by unilaterally and discriminatorily reducing employee bonus monies for calendar year 2003. In the Region's investigation of that case, a former Employer supervisor revealed that the Employer's Plant Manager told him prior to the election that he would recommend that the Employer cut or eliminate the bonus in order that employees "feel the pain," that

"this has got to stop here" (in apparent reference to the employees' organizational activity), and that "I'm going to give them the biggest pile of crap and let them take that back to their union brothers and if they choose to go out on the picket line I'll hire replacement workers." Based on this evidence of the Employer's discriminatory motive for the reduction of unit employees' bonuses, on July 23, 2004, the Region issued complaint in Case 4-CA-32939. The complaint does not allege that the Employer acted unlawfully by failing to adequately bargain with the Union prior to acting unilaterally, or by implementing the reduction of bonuses in the absence of a good-faith impasse, because of the Union's refusal to bargain over the 2003 bonuses. Rather, the complaint is limited to an 8(a)(3) allegation based on the evidence of discriminatory motive, and a derivative 8(a)(5) allegation based on the theory that an Employer can never lawfully implement a discriminatory change.

By late August 2004, the parties had held at least 36 full-day bargaining sessions, as well as meeting on several additional occasions, and had reached tentative agreement on more than 50 contract provisions other than employee bonuses. On August 26, 2004, the Union cancelled the bargaining sessions scheduled for August 30 and September 9, 2004, and the Union refused the Employer's requests that it return to the bargaining table because of what it asserted to be the Employer's unfair labor practices -- surface bargaining and the unilateral reduction in the 2003 bonus.

On September 13, 2004, the Employer notified the Union that, since the Union would not agree to resume bargaining, the Employer would unilaterally implement those terms in the Employer's last offer that could lawfully be implemented.[3] On September 14, 2004, the Employer implemented its last offer to the Union. On October 4, 2004, the Union filed the charge in Case 4-CA-33415, alleging that the Employer violated Section 8(a)(3) and (5) by unlawfully implementing its last contract offer to the Union.[4]

---

[3] The Employer further invited the Union to meet to review the implementation process and raise questions. On September 22, 2004, the Union responded that the Union would not resume bargaining until the Employer remedied its current unfair labor practices.

[4] On August 30, the Union had filed an amended charge in Case 4-CA-33315, alleging that the Employer violated Section 8(a)(3) and (5) by making discriminatory contract proposals, engaging in surface bargaining, and otherwise

ACTION

We conclude that the Region should not allege that the Employer's conduct was "inherently destructive" of important employee rights. We agree with the Region that the Employer's unlawful reduction of unit employees' scheduled bonuses so tainted the parties' bargaining that the Employer's September 2004 unilateral implementation of its bargaining proposals violated Section 8(a)(5), and that the overall surface bargaining allegation should be dismissed, absent withdrawal.

Derivative 8(a)(5) allegation

Initially, we agree with the Region that the Employer's discriminatorily motivated March 2004 decision to reduce unit employees' 2003 bonuses also derivatively violated Section 8(a)(5) for the following reasons. It is well established that an employer's unlawfully discriminatory implementation violates Section 8(a)(5) as well as 8(a)(3),[5] even in circumstances where the matter would otherwise be exempt from bargaining as an entrepreneurial decision.[6]

We are aware of no case, however, in which the Board has found such a derivative violation of Section 8(a)(5) despite a union's refusing to bargain over the employer's proposal, as did the Union here. We are also aware of no case in which the Board indicated any exception to the general rule on this basis. Thus, the issue remains an open one.

International Paper Co., supra, does not resolve this question. The Board in that case found an 8(a)(5) violation where the employer unilaterally implemented a discriminatory proposal, despite the employer's assertion of the union's unlawful bargaining tactics. However, the Board expressly noted that it did not need to decide the issue as the employer's argument was not timely raised.[7]

---

bargaining in bad faith by its failure to remedy its unlawful reduction of the employees' 2003 bonus.

[5] See, e.g., International Paper Co., 319 NLRB 1253, 1275-1276 (1995), enf. denied 115 F.3d 1045 (D.C. Cir. 1997).

[6] See, e.g., Central Transport, Inc., 306 NLRB 166, 166-167 (1992), enfd. in pertinent part 997 F.2d 1180 (7th Cir. 1993); Strawsine Mfg. Co., 280 NLRB 553 (1986).

[7] 319 NLRB at 1276-1277.

Thus, it might be argued that it would be inappropriate to find that an employer violated Section 8(a)(5) in any circumstances where the union has refused to bargain. Nonetheless, we agree with the Region that a Section 8(a)(5) violation should be found under the circumstances of this case. We see no basis for forcing a union into the "Hobson's choice" of requiring it either to undergo the futile act of bargaining over an unlawfully discriminatory proposal or to give up the possibility of a remedial order requiring the employer to bargain in good faith. In this regard, a union facing an unlawfully discriminatory proposal is in a position much like one facing notice of a fait accompli that is already in the process of implementation; in such cases, the Board will find that an employer violated Section 8(a)(5) regardless of whether the union sought to bargain or not.[8] Similarly, an employer may be found to derivatively violate Section 8(a)(5), despite a union's refusal to bargain over the employer's discriminatory proposal, as alleged by the Region in its outstanding complaint.

Inherently destructive

We further conclude that the Region should not allege that the Employer's conduct was "inherently destructive" of important employee rights. Significantly, this allegation would be in addition to the Section 8(a)(3) theory of discriminatory motive already alleged in the outstanding complaint based upon the independent evidence of the Employer's anti-Union animus.

The Supreme Court has held that some employer conduct is so "inherently destructive" of employee interests that it may be deemed proscribed by Section 8(a)(3) even without proof of an underlying improper motive.[9] The Court stated that:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the

---

[8] See, e.g., Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983).

[9] NLRB v. Great Dane Trailers, 388 U.S. 26, 33 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221, 227-228 (1963).

> conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.[10]

For example, the Board has found an employer's denials of previously scheduled wage increases to newly-represented employees to be "inherently destructive" where the employer based the denials on the parties' new bargaining obligations, particularly in circumstances where the employer unilaterally implemented the denials without notice or an opportunity for the newly-certified union to bargain over the changes, and where the employer placed the blame for the decision on the union.[11] Such employer conduct falls outside the general rule that an employer may grant benefits to unrepresented employees while withholding such benefits from represented employees, in the absence of independent evidence of discrimination or other unlawful conduct.[12]

In the instant cases, the Employer decided to reduce the scheduled 2003 bonuses after its employees elected the

---

[10] Great Dane Trailers, 388 U.S. at 33 (emphasis in original).

[11] See United Aircraft Corporation, 199 NLRB 658, 662 (1972), enfd. in pertinent part 490 F.2d 1105 (2d Cir. 1973); Harowe Servo Controls, Inc., 250 NLRB 958, 1035 (1980) ("[r]espondent's apprehension of union demands for additional economic improvements did not establish sufficient business justification, because [r]espondent was under no obligation to agree to such demands").

[12] See, e.g., Empire Pacific Industries, Inc., 257 NLRB 1425, 1426 (1981); B.F. Goodrich Co., 195 NLRB 914, 915 fn.4 (1972). Compare Chevron Oil Co., 182 NLRB 445, 449-50 (1971), enf. denied on other grounds 442 F.2d 1067 (5th Cir. 1971) (granting benefits only to unrepresented employees violative of Section 8(a)(3) where employer engaged in bad faith bargaining and Section 8(a)(1) threats and coercion); Florida Steel Corporation, 226 NLRB 123, 124 fn. 9 (1976), enfd. mem. 562 F.2d 46 (4th Cir. 1977) (employer's withholding of benefits only from union-represented employees independently violative of Section 8(a)(3) where withholding arose in context of flagrant 8(a)(1) and (3) violations).

Union, similar to the conduct of the employers in United Aircraft and Harowe Servo Controls. However, unlike the employers in those cases, it gave the Union notice of its proposal to eliminate unit employees from the bonus plan more than 8 months before it implemented the reduction and an opportunity to bargain over the proposed reduction. Therefore, the Employer did not independently violate Section 8(a)(5) by its March 2004 implementation of the unilateral reduction in bonuses, particularly in light of the Board's recent decision in TXU Electric Co.[13]

In TXU Electric, the Board dismissed a Section 8(a)(5) allegation against an employer which, during negotiations for an overall collective-bargaining agreement, unilaterally implemented a proposed one-time exclusion of unit employees from an annually-recurring salary increase plan after the union failed to request bargaining or make proposals about that year's exclusion. Significantly, there was no allegation of discrimination in TXU Electric.[14] In the instant cases, although we are alleging that the Employer violated Section 8(a)(5), it is solely a derivative violation because the Employer implemented a discriminatorily motivated proposal. Absent such discriminatory intent, the Employer would be privileged to implement under TXU Electric. Thus, as the Employer's implementation would be lawful under Section 8(a)(5) but for the evidence of discriminatory motive here, there is a substantial question as to whether it could simultaneously be found to be "inherently destructive" in violation of Section 8(a)(3), an analysis which does not turn on evidence of motive. Therefore, in the circumstances of these cases, the Region should not allege that the Employer's March 2004 implementation is "inherently destructive" of important employee rights and violative of Section 8(a)(3), given the direct evidence of the Employer's discriminatory motive present here and the potential conflict with the Board's recent holding in TXU Electric.

[13] 343 NLRB No. 132, slip op. at 2-5 (2004).

[14] Id., slip op. at 3 n.10.

Tainted bargaining and the Employer's September 2004 implementation

We agree with the Region that the Employer's March 2004 unlawful reduction of unit employees' scheduled 2003 bonuses tainted the parties' bargaining so that the Employer's September 2004 unilateral implementation of its bargaining proposals violated Section 8(a)(5). Although an employer which has bargained in good faith to impasse may implement the terms of its final offer, it is not privileged to implement if the impasse is reached in the context of serious unremedied unfair labor practices that affect the negotiations.[15] Similarly, an employer is not privileged to implement the terms of its proposals, even where the union refuses to bargain, if negotiations broke down because of the employer's serious unremedied unfair labor practices.[16] Thus, in Noel Corp., the Board found that an employer violated Section 8(a)(5) by implementing the terms of its final proposal, even where the union refused to bargain, because the union's refusal was the proximate result of the employer's unlawful refusal to reinstate striking employees.

In the instant cases, the Union's refusal to bargain in August and September 2004 was clearly linked to the Employer's discriminatory reduction of unit employees' bonuses. The Union explained at the time that it was refusing to bargain over the Employer's unfair labor practices -- its assertion of surface bargaining and the reduction in the 2003 bonus. While we conclude below that the surface bargaining allegation should be dismissed, it is clear that the unlawfully reduced bonus was profoundly important to the Union, given its significant financial impact on unit employees and the discriminatory character of the Employer's conduct. Indeed, the Employer's Plant Manager recognized the paramount importance of this issue

---

[15] See, e.g., Lafayette Grinding Corp., 337 NLRB 832, 833 (2002) (unilateral cessation of health and welfare contributions, resulting in loss of coverage); Great Southern Fire Protection, Inc., 325 NLRB 9, 9 n.1 (1997)(unilateral change of insurance carrier and failure to pay welfare and pension premiums); Columbian Chemicals Co., 307 NLRB 592, 592 fn. 1, 596 (1992) (unilateral imposition of absence control policy), enfd. mem. 993 F.2d 1536 (4th Cir. 1993); J. W. Rex Co., 308 NLRB 473, 473, 496 (1992) (employer had unlawfully refused to meet upon request), enfd. mem. 998 F.2d 1003 (3d Cir. 1993).

[16] Noel Corp., 315 NLRB 905, 910-911 (1994), enf. denied on other grounds 82 F.3d 1113 (D.C. Cir. 1996).

when he said that he wanted the Employer to cut or eliminate the bonus in order that employees "feel the pain," that "this has got to stop here" (in apparent reference to the employees' organizational activity), and that "I'm going to give them the biggest pile of crap and let them take that back to their union brothers and if they choose to go out on the picket line I'll hire replacement workers." Thus, as in Noel Corp., the Union's refusal to bargain was the proximate result of the Employer's serious unremedied unfair labor practice, and the Employer's September 2004 implementation violated Section 8(a)(5).

Surface bargaining

Finally, we agree with the Region that the surface bargaining allegation should be dismissed. In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table,[17] considering such factors as delaying tactics, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, arbitrary scheduling of meetings, failure to provide relevant information, failure to give explanations for bargaining positions, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, and unlawful conduct away from the bargaining table.[18] From this framework, the Board determines whether the party is "engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement,"[19] and is especially sensitive to claims that bargaining for a first contract has not been in good faith.[20]

In the instant cases, there is no contention of many of these indicia of bad-faith bargaining, such as delaying tactics, efforts to bypass the union, failure to designate

---

[17] See, e.g., Public Service Co. of Oklahoma, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003).

[18] See Mid-Continent Concrete, 336 NLRB 258, 259–260 (2001), enfd. 308 F.3d 859 (8th Cir. 2002); Altorfer Machinery, 332 NLRB 130, 150 (2000); Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984).

[19] Public Service Co., 334 NLRB at 487.

[20] APT Medical Transportation, 333 NLRB 760, 760 fn. 4 (2001).

an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, arbitrary scheduling of meetings, or failure to provide relevant information. The parties met frequently and regularly, the Employer did not engage in regressive bargaining, it made concessions, and indeed reached agreement with the Union on a number of issues.

Further, there is no allegation that the Employer failed to give explanations for its proposals, other than perhaps the elimination of unit employees' bonuses. Even in that regard, however, the Employer did give an explanation, saying that the Union's proposals would not leave the Employer with sufficient flexibility in operations to warrant a bonus of any kind. While this explanation may not have satisfied the Union, or provided adequate business justification for the Employer's unlawful implementation of the bonus cut for 2003, it is not so frivolous or unreasonable as to indicate overall bad-faith bargaining. This is particularly the case given that other unions representing the Employer's employees have agreed to collective-bargaining agreements containing provisions for reduced or eliminated bonuses, apparently in return for other terms and conditions of employment desired by those unions. Moreover, the Employer's conduct in this regard must be viewed in light of the Union's failure to sincerely engage the Employer on this point, choosing instead merely to reiterate its own position for an unchanged bonus plan and challenge the Employer's right to even bargain over the 2003 bonuses.[21]

Nor were the Employer's proposals "so harsh, vindictive, or otherwise unreasonable as to warrant the conclusion that they were proffered in bad faith."[22] While in certain limited circumstances the Board will find bad-faith bargaining based on the content of the employer's proposals, the Board's examination of a party's "bargaining position and proposals relates to whether they indicate an intention by the Respondent to avoid reaching an agreement;

---

[21] In determining whether there has been a failure to bargain in good faith, "the Board considers such matters as a party's explanations for positions, its conduct on other issues and the other party's responses." Hostar Marine Transport Systems, 298 NLRB 188, 196-97 (1990) (no bad-faith bargaining where the employer explained its positions and made major concessions at the table, and the union was unwilling to change its position to meet the employer's need for flexibility).

[22] Genstar Stone Products, 317 NLRB 1293, 1293 (1995).

it is not a subjective evaluation of their content."[23] Other than the exclusion of unit employees from the bonus plan, the Employer's proposals were largely unremarkable; as the Region found, they provide no indicia of surface bargaining. Even the significant cut in employee compensation represented by the cut in bonuses does not reach a level demonstrating bad faith by the Employer, particularly as the Employer proposed some offsetting raises in base wages, albeit minor ones, and as there were no Employer proposals that would deprive the union of any significant representational role.[24] Thus, the Board has found no violation where an employer proposed a 24% wage reduction, 14% reduction in fringe benefits, elimination of union shop, elimination of seniority job bidding, non-unit personnel performance of unit work, additional employee contributions to the pension plan, cost-shifting in the medical plan, and elimination of the dental plan,[25] or even where an employer proposed wage cuts of greater than 50 percent, where the proposal was due to significant economic losses.[26] The proposed bonus cut in the instant cases clearly do not rise to even the levels of the concessions sought in those cases, and do not themselves show bad faith.

Finally, we agree with the Region that the evidence of the Employer's retaliatory and discriminatory motive for its bonus proposal, and its unlawful implementation of the March 2004 bonus cut, also do not provide sufficient indicia of an intent to avoid agreement upon which to base an overall bad-faith bargaining violation. In this regard, we note that, while the Board will consider misconduct away from the bargaining table and isolated statements for what light they shed on conduct at the table, it is extremely

---

[23] Litton Systems, 300 NLRB 324, 326-27 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992) (emphasis in original), citing Reichhold Chemicals, 288 NLRB 69 (1988), enfd. in pertinent part 906 F.2d 719 (D.C.Cir. 1990), cert. denied 498 U.S. 1053 (1991).

[24] See Modern Manufacturing, 292 NLRB 10, 10-11 (l988) (violation where employer insisted that it retain absolute discretion and control over every important economic term of employment and the right to deal directly with employees, while seeking to exclude almost every matter from arbitration).

[25] AMF Bowling, 314 NLRB 969, 975 (1994), enf. denied on other grounds 63 F.3d 1293 (4th Cir. 1995).

[26] Glenmar Cinestate, 264 NLRB 236, 236, 239 (1982).

reluctant to find that these factors provide an independent basis to find bad-faith bargaining without evidence that the party's conduct at the bargaining table itself indicates an intent not to reach agreement.[27] Thus, in the absence of other indicia of bad faith, we conclude that neither the one Employer statement demonstrating animus prior to the Union's election, nor the single unlawful change that tainted future bargaining and precluded the Employer from lawfully implementing its proposals in September 2004, demonstrated an Employer mindset intending to frustrate agreement. This is particularly the case as the unilaterally implemented exclusion of unit employees from the bonus plan did not independently violate Section 8(a)(5) of the Act, but was only unlawful because of the Employer's anti-Union motivation. Moreover, the Union did not genuinely engage the Employer on this issue, but instead merely reiterated its own position for an unchanged bonus plan and challenged the Employer's right to even bargain over the 2003 bonuses.

In sum, while the Employer's proposal to exclude unit employees from the bonus plan would result in a significant reduction of employee compensation, and appears to have been motivated by the Employer's animus, there is insufficient evidence that the Employer intended to frustrate agreement on which to find unlawful surface bargaining. Therefore, the Region should dismiss the overall surface bargaining allegation.

Accordingly, the Region should amend its complaint, absent settlement, to include the allegation that the Employer's reduction of unit employees' bonuses tainted the Employer's September 2004 unilateral implementation of its bargaining proposals in violation of Section 8(a)(5). The

---

[27] See, e.g., Litton Systems, 300 NLRB at 330; St. George Warehouse, Inc., 341 NLRB No. 120, slip op. at 4-5 (2004) (unilateral change and employer counsel's statement to union that "we both know what's going to happen here; you're not going to get a contract, and the Union [is] going to end up abandoning the shop" not sufficient to show bad faith in bargaining). See also Pleasantview Nursing Home, Inc. v. NLRB, 351 F.3d 747, 758 (6th Cir. 2003) (citing Industrial Electric Reels, 310 NLRB 1069, 1072 (1993) ("Where the overall bargaining conduct indicates good faith and willingness to negotiate, a stray statement indicating inflexibility will not overcome the general tenor of good faith negotiation"). Compare Mid-Continent Concrete, 336 NLRB at 261 (finding surface bargaining where employer made unilateral changes and stated that bargaining was futile and the union would be there only 1 year).

Region should dismiss, absent withdrawal, the allegation that the March 2004 reduction of bonuses was inherently destructive of important employee rights in violation of Section 8(a)(3), and the allegation that the Employer engaged in overall surface bargaining in violation of Section 8(a)(5).

B.J.K.